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8 UNITED STATES DISTRICT COURT  
9 CENTRAL DISTRICT OF CALIFORNIA  
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11 JODEY GALVAN, ) NO. EDCV 09-01310 SS  
12 Plaintiff, )  
13 v. ) MEMORANDUM DECISION AND ORDER  
14 MICHAEL J. ASTRUE, )  
15 Commissioner of the Social )  
16 Security Administration, )  
17 Defendant. )  
18

19  
20 INTRODUCTION  
21

22 Plaintiff Jodey Galvan ("Plaintiff") brings this action seeking to  
23 reverse the decision of the Commissioner of the Social Security  
24 Administration (the "Commissioner" or the "Agency") denying her  
25 application for Disability Insurance Benefits ("DIB"). The parties  
26 consented, pursuant to 28 U.S.C. § 636(c), to the jurisdiction of the  
27 undersigned United States Magistrate Judge. For the reasons stated  
28 below, the decision of the Agency is REVERSED and REMANDED for further  
proceedings.

**PROCEDURAL HISTORY**

On February 6, 2004, Plaintiff filed an application for DIB benefits claiming that she became disabled on December 19, 2003. (Administrative Record ("AR") 156-58). The Agency denied her application and she submitted a request for reconsideration on September 14, 2004. (AR 95). The Agency denied her application again on January 5, 2005. (AR 98-102). Plaintiff then requested a hearing, which was held before Administrative Law Judge ("ALJ") Keith F. Varni on April 14, 2006. (AR 45-66). Plaintiff appeared with counsel and testified. (AR 47-65).

On September 15, 2006, the ALJ issued a decision denying benefits. (AR 38-44). Plaintiff sought review before the Appeals Council, which vacated the decision on June 8, 2007 and remanded the matter for a new hearing. (AR 127-31). The Appeals Council determined that the ALJ had failed to adequately evaluate the medical opinion evidence, failed to adequately consider the Plaintiff's obesity, and failed to adequately consider lay testimony. (AR 129-30).

On January 23, 2008, the ALJ held a remand hearing. (AR 67-87). Plaintiff was again represented by counsel and testified. (AR 69-81). Joseph Mooney, a vocational expert, also testified at the hearing. (AR 81-84). On March 10, 2008, the ALJ issued a decision again denying benefits. (AR 19-32). Plaintiff sought review before the Appeals council, which denied her request on March 18, 2009. (AR 8-11). Plaintiff filed the instant action on July 10, 2009. Pursuant to the

1 Court's Case Management Order, the parties filed a Joint Stipulation  
2 ("Jt. Stip.") on December 30, 2009.

3  
4 **THE FIVE-STEP SEQUENTIAL EVALUATION PROCESS**

5  
6 To qualify for disability benefits, a claimant must demonstrate a  
7 medically determinable physical or mental impairment that prevents him  
8 from engaging in substantial gainful activity<sup>1</sup> and that is expected to  
9 result in death or to last for a continuous period of at least twelve  
10 months. Reddick v. Chater, 157 F.3d 715, 721 (9th Cir. 1998) (citing  
11 42 U.S.C. § 423(d)(1)(A)). The impairment must render the claimant  
12 incapable of performing the work he previously performed and incapable  
13 of performing any other substantial gainful employment that exists in  
14 the national economy. Tackett v. Apfel, 180 F.3d 1094, 1098 (9th Cir.  
15 1999) (citing 42 U.S.C. § 423(d)(2)(A)).

16  
17 To decide if a claimant is entitled to benefits, an ALJ conducts  
18 a five-step inquiry. 20 C.F.R. § 416.920. The steps are:

- 19  
20 (1) Is the claimant presently engaged in substantial gainful  
21 activity? If so, the claimant is found not disabled.  
22 If not, proceed to step two.  
23 (2) Is the claimant's impairment severe? If not, the  
24 claimant is found not disabled. If so, proceed to step  
25 three.

26  
27 

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<sup>1</sup> Substantial gainful activity means work that involves doing  
28 significant and productive physical or mental duties and is done for pay  
or profit. 20 C.F.R. § 416.910.

1 (3) Does the claimant's impairment meet or equal the  
2 requirements of any impairment listed at 20 C.F.R. Part  
3 404, Subpart P, Appendix 1? If so, the claimant is  
4 found disabled. If not, proceed to step four.

5 (4) Is the claimant capable of performing his past work? If  
6 so, the claimant is found not disabled. If not, proceed  
7 to step five.

8 (5) Is the claimant able to do any other work? If not, the  
9 claimant is found disabled. If so, the claimant is  
10 found not disabled.

11  
12 Tackett, 180 F.3d at 1098-99; see also Bustamante v. Massanari, 262 F.3d  
13 949, 953-54 (9th Cir. 2001) (citations omitted); 20 C.F.R. § 416.920(b) -  
14 (g)(1).

15  
16 The claimant has the burden of proof at steps one through four, and  
17 the Commissioner has the burden of proof at step five. Bustamante, 262  
18 F.3d at 953-54. If, at step four, the claimant meets his burden of  
19 establishing an inability to perform the past work, the Commissioner  
20 must show that the claimant can perform some other work that exists in  
21 "significant numbers" in the national economy, taking into account the  
22 claimant's residual functional capacity ("RFC"),<sup>2</sup> age, education and  
23 work experience. Tackett, 180 F.3d at 1100; 20 C.F.R. § 416.920(g)(1).  
24 The Commissioner may do so by the testimony of a vocational expert or  
25 by reference to the Medical-Vocational Guidelines appearing in 20 C.F.R.  
26 Part 404, Subpart P, Appendix 2 (commonly known as "the Grids").

27 <sup>2</sup> Residual functional capacity is "the most [one] can still do  
28 despite [his] limitations" and represents an assessment "based on all  
the relevant evidence." 20 C.F.R. § 416.945(a).

1 Osenbrock v. Apfel, 240 F.3d 1157, 1162 (9th Cir. 2001). When a  
2 claimant has both exertional (strength-related) and nonexertional  
3 limitations, the Grids are inapplicable and the ALJ must take the  
4 testimony of a vocational expert. Moore v. Apfel, 216 F.3d 864, 869  
5 (9th Cir. 2000).

#### 6 7 **THE ALJ'S DECISION** 8

9 The ALJ employed the five-step sequential evaluation process. At  
10 step one, the ALJ found that Plaintiff had not engaged in substantial  
11 gainful employment since her alleged onset date. (AR 21). At step two,  
12 the ALJ found that Plaintiff had a "very questionable severe impairment  
13 in the musculoskeletal system from minimal degenerative changes and from  
14 a presumption of fibromyalgia." (Id.). The ALJ further concluded that  
15 Plaintiff's "medically determinable mental impairments of depression  
16 considered singly and in combination do not cause more than minimal  
17 limitation in the claimant's ability to perform basic mental work  
18 activities and are nonsevere." (Id.). The ALJ explained that Plaintiff  
19 "has no restrictions in activities of daily living, mild limitations in  
20 social functioning, . . . no limitations in concentration, persistence,  
21 and pace[,]" and "has experienced no episodes of decompensation."  
22 (Id.).  
23

24 At step three, the ALJ found that Plaintiff's impairments, either  
25 singly or in combination, do not meet or equal the requirements of any  
26 impairment listed in 20 C.F.R. Part 404, Subpart P, Appendix 1. (AR  
27 22). At step four, the ALJ determined that Plaintiff retained a  
28 physical RFC for medium work, "except [that] she is able to frequently

1 climb, balance, stoop, kneel, crouch, and crawl." (AR 22).  
2 Specifically, the ALJ found:

3  
4 The claimant's subjective complaints do not credibly  
5 establish a residual functional capacity less than that found  
6 herein. There is a lack of medical documentation of an  
7 impairment which would cause extreme pain or pain which would  
8 compromise the claimant's ability to perform work-related  
9 activities. Furthermore, this is based on more than a lack  
10 of objective evidence, but rather the entire record as a  
11 whole does not reveal that the claimant is precluded from  
12 performing all regular, sustained work activity. The  
13 claimant's treatment generally has been routine and  
14 conservative and objective diagnostic evidence show only mild  
15 degenerative disease with no significant evidence of  
16 persistent spasms, neurological deficits, or arthritic  
17 stigmata. There is no evidence of disuse muscle atrophy or  
18 wasting commonly associated with severe pain. Also there is  
19 no evidence of significant attention, concentration, or  
20 cognitive deficits. Furthermore, the claimant's treating and  
21 examining doctors all found the claimant noncompliant with  
22 treatment with suggestions of drug seeking behavior and any  
23 exacerbation caused by noncompliance is an additional basis  
24 for denying benefits. Consequently, I find that the  
25 claimant's allegations of pain and limitation are not fully  
26 credible and not consistent with the medical record (20 CFR  
27 404.1529, Social Security Ruling 96-7p). Although it appears  
28 that the claimant experiences some pain due to degenerative

1 disease and fibromyalgia, it is not of the degree she  
2 alleges. In fact, the claimant testified at the hearing that  
3 she sees Dr. Frausto only once a month and she sees Dr.  
4 Katsaros every 6 to 8 weeks. The claimant also stated that  
5 Dr. Mohr is her primary care physician, but she has not seen  
6 Dr. Mohr in a while. Certainly, such treatment is not  
7 consistent with any debilitating condition or the alleged  
8 level of pain asserted by the claimant.

9  
10 (AR 31).

11  
12 At step five, the ALJ found that based on Plaintiff's age,  
13 educational background, work experience, RFC and the vocational expert's  
14 testimony, Plaintiff was "capable of performing past relevant work as  
15 a fiscal analyst. (AR 32). Accordingly, the ALJ found that Plaintiff  
16 was not disabled. (Id.).

#### 17 18 STANDARD OF REVIEW

19  
20 Under 42 U.S.C. § 405(g), a district court may review the  
21 Commissioner's decision to deny benefits. The court may set aside the  
22 Commissioner's decision when the ALJ's findings are based on legal error  
23 or are not supported by substantial evidence in the record as a whole.  
24 Aukland v. Massanari, 257 F.3d 1033, 1035 (9th Cir. 2001); Smolen v.  
25 Chater, 80 F.3d 1273, 1279 (9th Cir. 1996).

26  
27 "Substantial evidence is more than a scintilla, but less than a  
28 preponderance." Reddick, 157 F.3d at 720. It is "relevant evidence

1 which a reasonable person might accept as adequate to support a  
2 conclusion." Id. To determine whether substantial evidence supports  
3 a finding, the court must "'consider the record as a whole, weighing  
4 both evidence that supports and evidence that detracts from the  
5 [Commissioner's] conclusion.'" Aukland, 257 F.3d at 1035 (quoting Penny  
6 v. Sullivan, 2 F.3d 953, 956 (9th Cir. 1993)). If the evidence can  
7 reasonably support either affirming or reversing that conclusion, the  
8 court may not substitute its judgment for that of the Commissioner.  
9 Reddick, 157 F.3d at 720-21.

## 10 11 DISCUSSION

12  
13 Plaintiff contends that the ALJ erred for two reasons. First, she  
14 argues that the ALJ failed to adequately consider the evidence from  
15 treating psychiatrist Dr. Theresa Frausto in finding that she suffers  
16 no legally severe mental impairments. (Jt. Stip. at 5-12). Second,  
17 Plaintiff asserts that the ALJ failed to adequately incorporate  
18 limitations stemming from her fibromyalgia into her RFC. (Jt. Stip. at  
19 15-16). For the reasons discussed below, the Court finds that the ALJ's  
20 decision should be reversed and this action remanded for further  
21 proceedings.

### 22 23 **A. The ALJ Failed To Properly Assess Plaintiff's Mental Health** 24 **Impairment At Step Two Of The Evaluation Process**

25  
26 Plaintiff argues that the ALJ erred by finding that her mental  
27 impairment was not severe. (Jt. Stip. at 5-12). Specifically,  
28 Plaintiff complains that the ALJ's "characterization of her symptoms as



1 being no more than 'transient to mild, . . . flies in the face of the  
2 ongoing, significant findings on mental status examinations." (Jt.  
3 Stip. at 9). Plaintiff further contends that "the ALJ's finding that  
4 Dr. Frausto's notes contain no evidence to support the working diagnoses  
5 of bipolar disorder, ADHD, an eating disorder, or obsessive compulsive  
6 traits . . . is unsupported by any actual medical evidence other than  
7 the ALJ's lay opinion that the above-noted findings are somehow, from  
8 a psychiatric point of view, insufficient." (Jt. Stip. at 9-10).

9  
10 By its own terms, the evaluation at step two is a de minimis test  
11 intended to weed out the most minor of impairments. See Bowen v.  
12 Yuckert, 482 U.S. 137, 153-54, 107 S. Ct. 2287, 96 L. Ed. 2d 119 (1987);  
13 Edlund v. Massanari, 253 F.3d 1152, 1158 (9th Cir. 2001) (quoting  
14 Smolen, 80 F.3d at 1290) (stating that the step two inquiry is a de  
15 minimis screening device to dispose of groundless claims). An  
16 impairment is not severe only if the evidence establishes "a slight  
17 abnormality that has no more than a minimal effect on an individuals  
18 ability to work." Smolen, 80 F.3d at 1290 (internal quotations and  
19 citations omitted).

20  
21 The ALJ here applied more than a de minimis test when he determined  
22 that Plaintiff's mental impairment was not severe. Moreover, he failed  
23 to follow the Secretary's own regulations governing the evaluation of  
24 mental impairments, as described below.

25  
26 Where there is evidence of a mental impairment that allegedly  
27 prevents the plaintiff from working, the Agency has supplemented the  
28

1 five-step sequential evaluation process with additional regulations.<sup>3</sup>  
2 Maier v. Comm'r of the Soc. Sec. Admin., 154 F.3d 913, 914-15 (9th Cir.  
3 1998) (per curiam) (citing 20 C.F.R. § 416.920a). First, the ALJ must  
4 determine the presence or absence of certain medical findings relevant  
5 to the plaintiff's ability to work. 20 C.F.R. § 416.920a(b)(1).  
6 Second, when the plaintiff establishes these medical findings, the ALJ  
7 must rate the degree of functional loss resulting from the impairment  
8 by considering four areas of function: (a) activities of daily living;  
9 (b) social functioning; (c) concentration, persistence, or pace; and (d)  
10 episodes of decompensation. 20 C.F.R. § 416.920a(c)(2)-(4). Third,  
11 after rating the degree of loss, the ALJ must determine whether the  
12 claimant has a severe mental impairment. 20 C.F.R. § 416.920a(d).  
13 Fourth, when a mental impairment is found to be severe, the ALJ must  
14 determine if it meets or equals a listing in 20 C.F.R. Part 404, Subpart  
15 P, Appendix 1. 20 C.F.R. § 416.920a(d)(2). Finally, if a listing is  
16 not met, the ALJ must then assess the plaintiff's RFC, and the ALJ's  
17 decision "must incorporate the pertinent findings and conclusions"  
18 regarding the plaintiff's mental impairment, including "a specific  
19 finding as to the degree of limitation in each of the functional areas  
20 described in [§ 416.920a(c)(3)]." 20 C.F.R. § 416.920a(d)(3), (e)(2).

21  
22 The regulations describe an impairment as follows:

23  
24 A physical or mental impairment must result from anatomical,  
25 physiological, or psychological abnormalities which can be

26 <sup>3</sup> These additional steps are intended to assist the ALJ in  
27 determining the severity of mental impairments at steps two and three.  
28 The mental RFC assessment used at steps four and five of the evaluation  
process, on the other hand, require a more detailed assessment. Social  
Security Ruling 96-8P, 1996 WL 374184 at \* 4.

1 shown by medically acceptable clinical and laboratory  
2 diagnostic techniques. A physical or mental impairment must  
3 be established by medical evidence consisting of signs,  
4 symptoms, and laboratory findings, not only by [a  
5 plaintiff's] statements of symptoms.

6  
7 20 C.F.R. § 416.908; see also Ukolov v. Barnhart, 420 F.3d 1002, 1005  
8 (9th Cir. 2005) (noting that the existence of a medically determinable  
9 physical or mental impairment may only be established with objective  
10 medical findings) (citing Social Security Ruling 96-4p, 1996 WL 374187  
11 at \*1-2).

12  
13 Here, Plaintiff's medical records show that she has obtained  
14 psychiatric care from Dr. Frausto approximately monthly since June of  
15 2003. (AR 528-43, 748). On June 11, 2003, Dr. Frausto noted that  
16 Plaintiff had symptoms suggestive of severe Major Depression and bulimia  
17 with mental status examination showing a suspicious attitude,  
18 distractibility, rumination, impaired ability to manage daily living  
19 activities, and impaired ability to plan ahead and see consequences.  
20 (AR 542-43). Dr. Frausto prescribed Lexapro and Klonopin. (Id.). Dr.  
21 Frausto assessed Plaintiff with a GAF of 50, which indicates severe  
22 social and/or occupational function. (AR 543). Over the next two  
23 months, Dr. Frausto made clinical findings that Plaintiff continued to  
24 suffer from depression and anxiety. (AR 537-40). Dr. Frausto assessed  
25 Plaintiff's GAF at 50 and 65 during this time period. (Id.).

26  
27 On November 26, 2003, Dr. Frausto increased Plaintiff's dosage of  
28 Lexapro and Neurontin. (AR 536). On March 3, 2004, Dr. Frausto

1 described Plaintiff as "look[ing] better" and "not fatigued" after she  
2 successfully discontinued MS Contin, but noted that Plaintiff continued  
3 to complain of fatigue and trouble sleeping. (AR 533). On June 25,  
4 2004, Dr. Frausto noted that Plaintiff had lost 45 pounds after  
5 undergoing gastric bypass surgery, but that she continued to suffer from  
6 pain, fatigue, and poor sleep. (AR 532). On November 3, 2004, Dr.  
7 Frausto described Plaintiff as having "lots of energy," but with  
8 increased purging related to Plaintiff's bulimia. (AR 529). Dr.  
9 Frausto further noted that she suspected bipolar disorder because  
10 Plaintiff had maxed out all her credit cards and either gambles too much  
11 or eats too much. (Id.). On November 17, 2004, Dr. Frausto noted that  
12 Plaintiff was "tearful" and prescribed Lexapro and Abilify. (AR 528).

13  
14 On March 14, 2005, Dr. Frausto noted that Plaintiff continued to  
15 show symptoms of bipolar disorder and had been bingeing and purging. (AR  
16 568-72). On April 4, 2005, Dr. Frausto described Plaintiff as "tired  
17 looking" and noted that she was "mourning the pope." (AR 606). Over  
18 the next two months, Dr. Frausto continued to indicate that Plaintiff  
19 suffered from bipolar disorder. (AR 603-05). On October 10, 2005, Dr.  
20 Frausto diagnosed Plaintiff with bipolar disorder, ADHD, and OCD. (AR  
21 641). In November and December of 2005, Dr. Frausto diagnosed Plaintiff  
22 with bipolar disorder, OCD, ADHD, and fibromyalgia. (AR 639-40). On  
23 January 9, 2006, Dr. Frausto noted that Plaintiff was more anxious, more  
24 depressed, and "[could not] put sentences together." (AR 636).

25  
26 In a summary report dated January 23, 2006, Dr. Frausto diagnosed  
27 Plaintiff with bipolar disorder, ADHD, OCD, and bulimia. (AR 624). Dr.  
28 Frausto noted that Plaintiff was "compliant with all appointments and

1 with her medications," which included Depakote, Abilify, Cymbalta, and  
2 Concerta. (Id.). However, Dr. Frausto noted that Plaintiff's symptoms  
3 have persisted despite the medications:

4  
5 The symptoms have become worse over the last five years. She  
6 is either very depressed or irritable. She gets obsessed and  
7 preoccupied with death, fear of dying or suicidal. She has  
8 poor concentration and her thoughts become easily  
9 disorganized. She has difficulty making decisions. She is  
10 anxious and gets panic attacks if she goes into stores or in  
11 public places where there are a lot of people. She requires  
12 the assistance of her husband for daily activities of living.  
13 Her husband manages the checkbook because of [Plaintiff's]  
14 poor judgment, impulse control and hyper-spending. Her  
15 husband also does all the cooking and shopping for food.  
16 [Plaintiff] will often requires assistance with bathing due  
17 to depression, lack of energy and chronic pain.

18  
19 (Id.).  
20

21 On February 6, 2006, Dr. Frausto noted that Plaintiff had completed  
22 an inpatient detoxification program for reliance on opioid medications,  
23 but that Plaintiff continued to show signs of bipolar disorder, OCD, and  
24 ADHD. (AR 637). On February 27, 2006, Dr. Frausto noted that Plaintiff  
25 continued to show signs of bulimia, had a "[b]lunted affect," and was  
26 "preoccupied with food." (AR 635). On March 20, 2006, Dr. Frausto  
27 noted that Plaintiff's sleep cycle was fluctuating dramatically from  
28 only a few hours on some nights to more than twelve hours on other

1 nights. (AR 696). On June 26, 2006, Dr. Frausto noted that Plaintiff  
2 was "tired looking" and had a "sad blunted affect." (AR 694). In  
3 October and November of 2006, Dr. Frausto noted that Plaintiff was  
4 feeling "hopeless" and admitted to suicidal and homicidal thoughts. (AR  
5 692-93).

6  
7 These objective medical findings indicate that Plaintiff suffered  
8 from a mental health impairment. See 20 C.F.R. § 416.927(a)(2)  
9 ("Medical opinions . . . that reflect judgments about the nature and  
10 severity of [a plaintiff's] impairment(s), including symptoms, diagnosis  
11 and prognosis," are evidence that a plaintiff may submit in support of  
12 his disability claim). The ALJ, however, failed to follow the  
13 Secretary's regulations for evaluating mental impairments. Moreover,  
14 the ALJ found that Plaintiff had "no restrictions in activities of daily  
15 living, mild limitations in social functioning, and no limitations in  
16 concentration, persistence, and pace." (AR 21). The ALJ did not state  
17 the basis for these conclusions and as set forth above, they are  
18 directly contradicted by the great weight of objective medical evidence.

19  
20 Remand for further proceedings is appropriate where additional  
21 proceedings could remedy defects in the Commissioner's decision. See  
22 Harman v. Apfel, 211 F.3d 1172, 1179 (9th Cir. 2000); Kail v. Heckler,  
23 722 F.2d 1496, 1497 (9th Cir. 1984). Because the ALJ improperly  
24 evaluated Plaintiff's mental health impairment at step two, the case  
25 must be remanded to remedy this defect.

26  
27 Upon remand, the ALJ must conduct the supplemental evaluation of  
28 mental impairment evidence. Normally, the ALJ must first determine the

1 presence or absence of certain medical findings relevant to the  
 2 plaintiff's ability to work. 20 C.F.R. § 416.920a(b)(1). However, this  
 3 Court has determined that there is objective medical evidence that  
 4 Plaintiff suffers from a mental impairment relevant to her ability to  
 5 work. Thus, the ALJ need not address this question. Accordingly, the  
 6 ALJ must only complete the remaining inquiries required in the  
 7 supplemental evaluation of mental impairment evidence.<sup>4</sup>

8  
 9 **B. On Remand The ALJ Should Consider Limitations Stemming From**  
 10 **Plaintiff's Fibromyalgia In The RFC Assessment**

11  
 12 In assessing RFC, the ALJ must consider limitations and  
 13 restrictions imposed by all of the claimant's impairments, even those  
 14 that are not severe. See Celaya v. Halter, 332 F.3d 1177, 1181-82 (9th  
 15 Cir. 2003). Here, the ALJ determined that Plaintiff retained a physical  
 16 RFC for medium work, "except [that] she is able to frequently climb,  
 17 balance, stoop, kneel, crouch, and crawl." (AR 22). This RFC, however,  
 18 is inconsistent with the medical evidence that Plaintiff has been  
 19 diagnosed with fibromyalgia.

20 <sup>4</sup> Specifically, the ALJ must rate the degree of functional loss  
 21 resulting from the impairment by considering four areas of function: (a)  
 22 activities of daily living; (b) social functioning; (c) concentration,  
 23 persistence, or pace; and (d) episodes of decompensation. 20 C.F.R. §  
 24 416.920a(c)(2)-(4). Next, after rating the degree of loss, the ALJ must  
 25 determine whether the claimant has a severe mental impairment. 20  
 26 C.F.R. § 416.920a(d). If the mental impairment is found to be severe,  
 27 the ALJ must determine if it meets or equals a listing in 20 C.F.R. Part  
 28 404, Subpart P, Appendix 1. 20 C.F.R. § 416.920a(d)(2). Finally, if  
 a listing is not met, the ALJ must then assess the plaintiff's RFC, and  
 the ALJ's decision "must incorporate the pertinent findings and  
 conclusions" regarding the plaintiff's mental impairment, including "a  
 specific finding as to the degree of limitation in each of the  
 functional areas described in [§ 416.920a(c)(3)]." 20 C.F.R. §  
 416.920a(d)(3), (e)(2).

1       Indeed, the ALJ acknowledged Plaintiff's fibromyalgia, but  
2 concluded that Plaintiff's subjective pain testimony was not credible:

3  
4       Although it appears that the claimant experiences some pain  
5 due to degenerative disease and fibromyalgia, it is not of  
6 the degree she alleges. In fact, the claimant testified at  
7 the hearing that she sees Dr. Frausto only once a month and  
8 she sees Dr. Katsaros every 6 to 8 weeks. The claimant also  
9 stated that Dr. Mohr is her primary care physician, but she  
10 has not seen Dr. Mohr in a while. Certainly, such treatment  
11 is not consistent with any debilitating condition or the  
12 alleged level of pain asserted by the claimant.

13  
14 (AR 31).

15  
16       As set forth above, the ALJ relied on Plaintiff's frequency of  
17 treatment to discredit her subjective pain testimony. (AR 31).  
18 Specifically, the ALJ concluded that Plaintiff's frequency of seeing her  
19 primary care physician, Dr. Gina Mohr, was "not consistent with any  
20 debilitating condition or the alleged level of pain asserted by the  
21 claimant." (Id.). However, Plaintiff testified that she stopped seeing  
22 Dr. Mohr regularly because of the cost. (AR 73) ("I have to, I would  
23 have to pay her in order to get a referral that I don't need so I don't  
24 generally go through her anymore."); see also Smolen, 80 F.3d at 1284  
25 ("Where a claimant provides evidence of a good reason for not taking  
26 medication for her symptoms, her symptom testimony cannot be rejected  
27 for not doing so."). Indeed, Plaintiff explained that her ability to  
28



1 seek medical care was limited by a recent change in her insurance and  
2 the fact that she has "so many financial problems." (AR 73).

3  
4 Moreover, the Court notes that objective symptoms "do not establish  
5 the presence or absence of fibromyalgia." Jordan v. Northrop Grumman  
6 Corp. Welfare Plan, 370 F.3d 869, 872 (9th Cir. 2004). As stated in  
7 Jordan:

8  
9 [F]ibromyalgia's cause or causes are unknown, there is no  
10 cure, and, of greatest importance to disability law, its  
11 symptoms are entirely subjective. There are no laboratory  
12 tests for the presence or severity of fibromyalgia.

13  
14 Id. Instead, a fibromyalgia diagnosis can only be confirmed by a  
15 specific test where a patient reports pain in five parts of the body and  
16 when at least eleven of eighteen points cause pain when palpated by an  
17 examiner's thumb. Id. (citing Rollins v. Massanari, 261 F.3d 853, 855  
18 (9th Cir. 2001)). Because Plaintiff suffers from fibromyalgia, the ALJ  
19 should not rely on general objective findings to determine related  
20 limitations for Plaintiff's RFC.

21  
22 On remand, the ALJ should consider limitations stemming from  
23 Plaintiff's fibromyalgia in the RFC assessment. Further, the ALJ cannot  
24 discredit Plaintiff's subjective pain testimony based on her frequency  
25 of medical treatment because she testified that she has severe financial  
26 limitations.

27  
28 \\\

**CONCLUSION**

Consistent with the foregoing, IT IS ORDERED that judgment be entered REVERSING the decision of the Commissioner and REMANDING this matter for further proceedings consistent with this decision. IT IS FURTHER ORDERED that the Clerk of the Court serve copies of this Order and the Judgment on counsel for both parties.

DATED: February 26, 2010

\_\_\_\_\_/s/\_\_\_\_\_  
SUZANNE H. SEGAL  
UNITED STATES MAGISTRATE JUDGE